

Comments in support of the Petition issued by the Southern Public Communication Association

We the payphone Association of Ohio support the position of the Southern Public Communication Association "SPCA". We point out a simple statement found on page eleven (11) of their petition "The MPSC Order is inconsistent with the Commission's payphone regulatory scheme to implement Section 276". Their petition for a declaratory ruling is proper to assure that state rulings are consistent with the Commissions orders. We believe that the Commission was clear and concise with regard to its intended payphone access pricing and regulatory scheme, that the Commission clearly provided an implementation schedule, and lastly that the Commission expected BOC compliance. The Payphone Association of Ohio strongly supports the FCC regarding the implementation of the New Services Test "NST" pricing mandate. These orders were not prepared in haste; they were developed after great thought and with the foresight needed to encourage the widespread deployment of pay telephones.

"The goals of Section 276 of the 1996 Act are to encourage the widespread deployment of payphone services for the benefit of the public and to promote competition among Payphone Service Providers (PSP's)."

We support the Southern Public Communications Association, and contend that the MPSC erred by failing to address all of the following:

- * The MPSC failed to recognize the hard implementation deadline ordered by the FCC in 96-128.

- * The MPSC allowed Bellsouth to charge excessive and unlawful rates beginning on April 15th, 1997 and continuing through to October 1, 2003.

- * The MPSC substituted an administrative tariff approval in lieu of a finding of fact that Bellsouth actually had complied with the NST pricing standard.

- * The MPSC erred by failing to consider the fact that pursuant to a RBOC Coalition promise the FCC's Waiver orders implicitly pre-empted the Filed Rate Doctrine, shifting control solely toward compliance with the FCC mandates.

The general circumstances have differed slightly from state to state, but the outcomes vary greatly. Some states have ordered full refunds, others have not. There is widespread inconsistency, and we are hopeful that the FCC will issue a declaratory ruling to help the states more accurately and efficiently handle these and other remaining questions.

Implementation deadline ordered by the FCC in 96-128
Did the FCC establish a deadline after which the BOC's were expected to have tariffed an "NST" compliant rate in effect?

The FCC orders provided a hard deadline and then made it painfully clear. In fact, facing the April 15th, 1997 deadline the RBOC Coalition made certain concessions, including a refund promise to facilitate a time extension. However, the Commission in granting the RBOC Coalition request reiterated its firm effective date, and included refund provisions. The MPSC was well aware that the FCC specified April 15th, 1997 as the deadline after which the RBOC's were to have compliant rates in effect. The FCC made a very strong statement and maintained its implementation deadline, a position that was clearly bolstered when the FCC issued its Waiver Orders. As an additional measure the FCC required the BOC's to certify compliance with NST pricing as a condition precedent for dial around eligibility, the FCC's displayed substantial commitment and resolve regarding this mandate.

The MPSC allowed Bellsouth to charge excessive and unlawful rates. Understanding that the FCC established an effective date by which "NST" compliant rates were to be in effect, any deviation would constitute an excessive and unlawful charge. In many states regulators are implementing pricing policies that follow the NST pricing guidelines established so long ago. Today in hind sight, it would appear that all parties in Mississippi agree that Bellsouth's pricing policy was not compliant with the Commission orders, and adjustments have been made. It is without question that the Mississippi PSP's were charged rates that were excessive and improper according to the FCC's pricing mandates beginning on April 15, 1997 continuing through to October 1, 2003. The MPSC defends its position indicating that the Filed rate doctrine is controlling.

Morally speaking, it would appear incomprehensible that the system would allow Bellsouth to simply accept the windfall, at the expense of the financially damaged PSP's. In many cases the moral position and the legal position are mutually exclusive. Fortunately, the Commission orders specifically forbids the state from avoiding compliance by reliance on the Filed rate doctrine or any other state code used as a shield designed to disregard, delay or preempt the mandates issued by the FCC in these proceedings.

The argument and conclusion that has led the State Commissions to rely on the Filed rate doctrine is fundamentally flawed. It assumes that the FCC provided the State Commissions with unlimited discretion, undefined pricing methods or optional enforcement. In this case, it appears unreasonable that the MPSC approved the tariff submitted by Bellsouth without concluding that it complied with the NST pricing mandate. The FCC provided clear direction, prior to relying upon the states to implement their orders. The Telecommunications Act of 1996 complete with its sweeping changes and requirements marked the first time in well over a decade whereby the states sought to implement FCC mandates. The orders caused much to change, this was not business as usual.

Administrative Approval

It is disturbing that the MPSC, armed with cost data and an FCC outlined pricing test would have approved a tariff that was excessive and did not comply with the orders issued in 96-128. However, the MPSC did not find the Bellsouth tariff to comply with the "NST" pricing policy, in fact they did not issue any finding at all. The tariff was not investigated or reviewed, it was approved by administrative policy. Therefore the question of whether or not Bellsouth complied with the FCC pricing

policy was not addressed by the MPSC. However, by confession Bellsouth did take measures to seek compliance in October 2003 through a substantial pricing adjustment. We ask the Commission to find that the "NST" pricing compliance was not optional. That administrative convenience did not rise to the level expected by the FCC pursuant to its directives in 96-128.

Filed Rate Doctrine

The reliance by the states on the Filed Rate Doctrine is unreasonable. The Commission clearly implied preemption within its Second Waiver Order. The Kellogg letter(s) provided a foundation for the Commissions first and second waiver orders, and in part included an ordering clause with respect to the promised "refunds or credits". To be specific, within the waiver orders, the FCC specifically ordered refunds. Regardless of the circumstances, time frames or supporting arguments, any refund or credit under every and any circumstances would be in direct conflict with the sates Filed Rate Doctrine. Therefore, unless we accept an FCC error coupled with an empty offer by Mr. Kellogg, the Filed Rate Doctrine was implicitly preempted. The FCC, by expressly conditioning its orders on the promise that the BOC's would "reimburse or provide credit to its customers" found that the Filed Rate Doctrine was not controlling.

Absent federal pre-emption or voluntary surrender, the Filed rate doctrine would have immediately invalidated the BOC promise and any subsequent FCC orders that included a refund provision. The fact that the FCC ordered that the BOC would "reimburse or provide credits to its customers for those payphone services from April 15th, 1997 if newly tariffed rates, when effective, are lower than the existing rates." Pay telephone reclassification and compensation provisions of the Telecommunications Act of 1996, order 12 FCC Rcd 21370, 21379-80, 20 (ccb 1997) ("Second Waiver Order") speaks clearly that the Filed Rate Doctrine was not controlling.

The FCC, through preemption, by agreement or by allowing the BOC's to waive protection by the Filed Rate Doctrine accepted the BOC promise. In as much as they allowed the waiver condition precedent, there is definitively conclusion that the Filed rate Doctrine was not controlling. The MPSC position regarding the Filed rate doctrine is therefore very difficult to accept, as it was without question pre-empted.

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